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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,972	04/08/2004	Kenneth E. Bailey JR.	030621	9539

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EXAMINER	
ABU ALI, SHUANGYI	

ART UNIT	PAPER NUMBER
1793	

MAIL DATE	DELIVERY MODE
10/29/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/820,972	BAILEY ET AL.	
	Examiner	Art Unit	
	Shuangyi Abu-Ali	1793	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *04 September 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-7,10-15,18-23,26-33 and 46-48* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-7, 10-15,18-23, 26-33 and 46-48* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

(1)

Status of Claims

Claims 1-7, 10-15,18-23 and 26-33 remain for examination wherein claims1-4, 10-12,18-19,23,26-33 are amended. Claims 46-48 are new.

(2)

Claim Rejections - 35 USC § 102

Claims 1-4, 10-12 and 18-23 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. patent No. 5,766,366 to Ferguson et al. as generally set forth in the first office action mailed on 06/04/2007 stands.

Claim Rejections - 35 USC § 102

Claim Rejections - 35 USC § 103

Claims 5-7, 13-15 and 26-33 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over U.S. patent No. 5,766,366 to Ferguson et al. as generally set forth in the first office action mailed on 06/04/2007 stands.

The text of those sections of title 35 US Code not included in this action can be found in the prior Office Action.

(3)

Response to Arguments

Applicant's arguments filed 09/04/2007 have been fully considered but they are not persuasive. Therefore, the grounds of rejection for claims 1-7, 10-15,18-23 and 26-33 as indicated in the first Office Action stand.

It is noted that the instant application claims are product-by-process claims. Eventhough product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 77F.2d 695, 698,227 USPQ 964,966 (Fed. Cir. 1985) (citations omitted).

Regarding claims 1-4, 10-12 and 18-23, applicants argue that the instant claim recite a dry-milled starch acidified composition comprising a viscosity profile. The Examiner respectfully submits that Ferguson discloses that their acid modified process I is suitable for any kind of starch (col.. 2, lines 7 and 8). This means both dry-milled and wet-milled starch is suitable for this process.

Regarding claims 5-7, 13-15 and 23-33, applicants argue that discloses a process of acid modifying wet-milled starch. The Examiner respectfully submits that Ferguson discloses that the acid modified process is suitable for any kind of starch (col.. 2, lines 7 and 8). This means both dry-milled and wet-milled starches are suitable for this process.

Regarding claim 10, applicants argue that the composition having a cereal protein content. The Examiner respectfully submits that since the acid-modified starch of Ferguson, which is prepared in a substantially similar manner as that of the instant claims. Therefore, it would be expected to have the same properties absent any evidence to the contrary.

Regarding claims 5-7,13-15 and 26-33, applicant argue that it is hindsight reconstruction to expect the composition having the viscosity profile and flour composition as applicant set forth in the instant application. The Examiner respectfully submits that since the acid modified starch of Ferguson et al. is made by a process substantially identical with the process for making the starch recited in the instant claims. It is reasonably expected that the modified starch of Ferguson is similar to that of the instant claims. If they are any difference, the difference must be minor and obvious. The burden is shifted to applicants to show the final modified starch is different. Furthermore, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 46-48 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over U.S. patent No. 5,766,366 to Ferguson et al.

Regarding claims 46-48, Ferguson et al. disclose a process of making an acid modified starch by reacting a starch component, which can be any kind of starch (col.. 2, lines 7 and 8) and any source of starch such as milo and corn (col. 2, lines 25-30), with an acid component (col. 4, lines 46-50). The acid is hydrochloric acid (col. 3, lines 2 and 3). The reaction is carried out at a temperature of 21 °C to 77 °C (col. 4, lines 41-42) for about 0.5 – 6 hours (col. 5, line 17).

Since the acid modified starch of Ferguson et al. is made by a process substantially identical with the process for making the starch recited in the instant claims. It is reasonably expected that the modified starch of Ferguson is similar to that of the instant claims. If they are any difference, the difference must be minor and obvious. The burden is shifted to applicants to show the final modified starch is different. Otherwise a prima facial case of anticipation, or in the alternative, of obviousness has been established.

(5)

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shuangyi Abu-Ali whose telephone number is 571-272-6453. The examiner can normally be reached on Monday - Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jerry Lorengo can be reached on 571-272-1233. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

SA

J. A. LORENGO
SUPERVISORY PATENT EXAMINER